Suruhanjaya Pencegahan Rasuah Malaysia & Ors v Latheefa Beebi Koya & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-31–04 OF 2015(W)
AHMAD MAAROP CJ (MALAYA), RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASAN LAH, ABU SAMAH NORDIN AND BALIA YUSOF FCJJ
9 AUGUST 2017

Administrative Law — Judicial review — Ambit — Respondent lawyers who insisted on being present when Malaysian Anti-Corruption Commission ('MACC') recorded statement from their client who was witness to alleged corruption offence were themselves ordered to provide statements — Respondents refused to comply — MACC issued respondents notices to attend at its office to give statements — Respondents applied for judicial review to quash notices for being unlawful and ultra vires MACC Act 2009 ('the MACC Act') — Respondents contended issuance of notices abuse of power and intended to intimidate — Whether acts or decisions of public authority in exercise of its powers of criminal investigation and enquiry were not open to judicial review — Whether respondents failed to show MACC's notices were mala fide — Whether neither Federal Constitution nor MACC Act conferred any right on witness summoned to provide statement in course of investigations to have his lawyers present when his statement being recorded

When the complainant in an alleged offence of corruption was summoned by the first appellant ('the MACC') to attend at its office to provide a statement to assist it in its investigation into the said offence, he arrived at the office accompanied by the respondents who were his lawyers. The respondents insisted on being present when their client's statement was being recorded contending that he had a constitutional right to have his counsel present. Initially, the MACC objected, stating that there was no provision in the Malaysian Anti-Corruption Commission Act 2009 ('the Act') that gave the respondents the right to be present. However, because of their persistence, the respondents were allowed to be present on condition their statements might also be recorded. The respondents did not interfere while the complainant's statement was being recorded, but after the procedure was over, the respondents were told that their statements were also required to be recorded. The respondents refused to comply. The third appellant, who was an MACC investigations officer, then issued each of the respondents with a notice ('the notice') under s 30(1)(a) of the Act requiring them to return four days later to provide their statements for the purpose of the investigations. Before the

scheduled date, the respondents notified the MACC that they would not present themselves as directed. They then sought leave from the High Court to apply for judicial review under O 53 of the then Rules of the High Court 1980 for an order to quash the notice; for a declaration that the notice was unlawful and ultra vires for having being issued in abuse of powers under the Act; and for a declaration that the MACC had no power to record statements from lawyers who had represented their client during the recording of their client's statement. The High Court, after granting leave, allowed the judicial review application and quashed the notice on finding that it was issued in abuse of power under the Act to intimidate the respondents and was therefore void and unlawful. The court found that there was no evidence that the respondents had interfered while their client's statement was being recorded. The Court of Appeal ('the COA') agreed with the High Court's findings and dismissed the appellants' appeal. The COA found that the notice was not issued in good faith and that the MACC's discretionary power to issue the notice was not an unfettered one but one that had to be exercised for a proper purpose and not unreasonably. The Federal Court granted the appellants leave to appeal against the COA's decision on the sole question whether the notice, being a procedural component in a criminal investigative process, was amenable to judicial review. The appellants argued that the notice was not judicially reviewable because it was merely an administrative or procedural decision made in the course of investigating an alleged corruption offence. The respondents, however, maintained that the decision to issue the notice was reviewable if, under the guise of investigation, it was actually intended to intimidate. The respondents submitted that since there was no nexus between them and the offence that was being investigated, and they had merely acted as counsel for their client, the issuance of the notice was clearly an abuse of power by the MACC. The respondents also contended that the complainant had a right to counsel under art 5 of the Federal Constitution while his statement was being recorded.

Held, allowing the appeal and setting aside the decision of the courts below:

(1) The actions or decisions of a public authority in exercise of its powers in the course of criminal investigation or enquiry were not open to judicial review. In the instant case, the issuance of the notice by MACC to the respondents was not amenable to judicial review. The notice was issued to assist the appellants in the investigation of a corruption offence under s 16(b) of the Act. To hold otherwise would expose the criminal investigative processes of all law enforcement agencies to constant judicial review (see para 42).

(2) The respondents failed to discharge their burden of proving that the notice was issued mala fide or in bad faith. Mere suspicion was not sufficient. The allegation of mala fide against the appellants was purely

because of the respondents' sheer insistence on being present during the recording of their client's statement (see paras 32, 34 & 42).

(3) Articles 5(2) or (3) of the Federal Constitution did not confer any constitutional right on the complainant to be represented by counsel during the recording of his statement as a witness. He was the complainant against a suspect in the commission of a corruption offence under s 16(b) of the Act. The complainant was a witness and not a suspect nor an arrested person or a person 'unlawfully detained'. The respondents' contention that their client had a constitutional right under art 5 to be represented by counsel was just a bare assertion without authority to support it. An allegation that the notice was issued as an act of intimidation or was issued mala fide based on the unmeritorious contention that the complainant had a constitutional right to be represented by counsel during the recording of his statement could not be the basis for quashing the notice (see paras 27 & 30).

(4) The fact that the respondents had not interfered during the recording of their client's statement was no justification for holding that the appellants had abused their powers in issuing the notice. It was not shown that the respondents had any legal or constitutional basis to be present or that their client had a constitutional right to be represented by counsel during the recording of his statement. There was no provision in the Act that gave solicitors the right to be present when their client's statement was being recorded in the course of an investigation. There was also no element of surprise or ambush as the respondents were informed in advance that their statements might be recorded if they insisted on being present (see paras 31 & 34).

[Bahasa Malaysia summary

Apabila pengadu di dalam kesalahan rasuah yang didakwa disaman oleh perayu pertama ('SPRM') untuk hadir ke pejabatnya bagi memberikan pernyataan untuk membantu penyiasatannya terhadap kesalahan tersebut, dia hadir dipejabatnya ditemani oleh responden-responden yang mana adalah peguamnya. Responden-responden mendesak untuk hadir apabila pernyataan anak guam mereka direkodkan dengan berhujah bahawa dia mempunyai hak perlembagaan untuk peguamnya hadir bersama. Pada mulanya, SPR membantah, dengan menyatakan bahawa tidak terdapat peruntukan di dalam Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 ('Akta') yang memberikan responden-responden hak untuk hadir. Walau bagaimanapun, kerana desakan mereka, responden-responden dibenarkan untuk hadir dengan syarat pernyataan mereka mungkin juga akan direkodkan. Responden-responden tidak campur tangan semasa pernyataan pengadu direkodkan, tetapi selepas prosedur selesai, responden-responden diberitahu yang pernyataan mereka juga dikehendaki untuk direkodkan. Responden-responden enggan mematuhi. Perayu ketiga, yang mana adalah

pegawai penyiasat SPRM, kemudiannya mengeluarkan kepada setiap responden-responden dengan notis ('notis tersebut') di bawah s 30(1)(a) Akta mengkehendaki mereka untuk kembali empat hari kemudian memberikan pernyataan mereka bagi tujuan penyiasatan. Sebelum tarikh yang dijadualkan tersebut, responden-responden memberitahu SPRM bahawa mereka tidak akan hadir seperti yang diarahkan. Mereka kemudiannya memohon izin daripada Mahkamah Tinggi untuk memohon bagi semakan kehakiman di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 pada ketika itu untuk perintah membatalkan notis tersebut; untuk perisytiharan bahawa notis tersebut adalah tak sah dan ultra vires kerana dikeluarkan dalam penyalahgunaaan kuasa di bawah Akta; dan untuk perisytiharan bahawa SPRM tidak mempunyai kuasa untuk merekod pernyataan daripada peguam yang mewakili anak guam mereka semasa perekodan pernyataan anak guam mereka. Mahkamah Tinggi, selepas memberikan izin, membenarkan permohonan semakan kehakiman dan membatalkan notis tersebut atas dapatan bahawa ia dikeluarkan dalam penyalahgunaan kuasa di bawah Akta untuk mengugut responden-responden dan oleh itu adalah batal dan salah dari segi undang-undang. Mahkamah mendapati bahawa tidak terdapat keterangan bahawa responden-responden telah campur tangan semasa pernyataan anak guam mereka direkodkan. Mahkamah Rayuan ('MR') bersetuju dengan dapatan Mahkamah Tinggi dan menolak rayuan perayu-perayu. MR mendapati bahawa notis tersebut tidak dikeluarkan dengan jujur dan bahawa kuasa budi bicara untuk mengeluarkan notis tersebut bukan satu yang tidak tersusun tetapi perlu dilaksanakan bagi tujuan betul dan munasabah. Mahkamah Persekutuan membenarkan perayu-perayu izin untuk merayu terhadap keputusan MR atas satu-satunya soalan sama ada notis tersebut, sebagai komponen prosedur dalam proses siasatan jenayah terbuka kepada semakan kehakiman. Perayu-perayu berhujah bahawa notis tersebut bukan boleh disemak secara kehakiman kerana ia hanya pentadbiran atau keputusan prosedur yang dibuat dalam perjalanan penyiasatan kesalahan rasuah yang didakwa. Responden-responden, walau bagaimanapun, mengekalkan bahawa keputusan untuk mengeluarkan notis adalah boleh disemak semula jika, di bawah nama penyiasatan, ia sebenarnya berniat untuk mengugut. Responden-responden berhujah bahawa memandangkan tidak terdapat hubungan di antara mereka dan kesalahan yang disiasat, dan mereka hanya bertindak sebagai peguam untuk anak guam mereka, pengeluaran notis adalah jelas penyalahgunaan kuasa oleh SPRM. Responden-responden juga berhujah bahawa pengadu mempunyai hak kepada peguam di bawah perkara 5 Perlembagaan Persekutuan semasa pernyataannya sedang direkodkan.

Diputuskan, membenarkan rayuan dan mengenepikan keputusan mahkamah-mahkamah bawahan:

(1) Tindakan atau keputusan-keputusan pihak berkuasa awam dalam menjalankan kuasanya dalam perjalanan penyiasatan jenayah atau

A siasatan tidak terbuka kepada semakan kehakiman. Dalam kes ini, pengeluaran notis tersebut oleh SPRM kepada responden-responden tidak terbuka kepada semakan kehakiman. Notis tersebut dikeluarkan untuk membantu perayu-perayu dalam penyiasatan kesalahan rasuah di bawah s 16(b) Akta. Untuk memutuskan sebaliknya akan mendedahkan B proses penyiasatan jenayah kesemua agensi penguatkuasaan undang-undang kepada semakan kehakiman yang berterusan (lihat perenggan 42).

(2) Responden-responden gagal untuk melepaskan beban mereka dengan C membuktikan bahawa notis tersebut dikeluarkan secara mala fide atau tidak jujur. Kesangsian semata-mata tidak mencukupi. Tuduhan mala fide terhadap perayu-perayu hanya semata-mata kerana desakan responden-responden untuk hadir semasa perekodan pernyataan anak guam mereka (lihat perenggan 32, 34 & 42).

D

(3) Perkara 5(2) atau (3) Perlembagaan Persekutuan tidak memberikan apa-apa hak kepada pengadu untuk diwakili oleh peguam semasa perekodan pernyataannya sebagai saksi. Dia adalah pengadu terhadap suspek di dalam perlakuan kesalahan rasuah di bawah s 16(b) Akta. E Pengadu adalah saksi dan bukan suspek atau pun orang yang ditangkap atau orang 'unlawfully detained'. Hujahan responden-responden bahawa anak guam mereka mempunyai hak perlembagaan di bawah perkara 5 untuk diwakili oleh peguam hanya pernyataan kosong tanpa autoriti untuk menyokongnya. Tuduhan bahawa notis tersebut dikeluarkan F sebagai tindakan mengugut atau dikeluarkan secara mala fide berdasarkan atas hujahan yang tidak bermerit bahawa pengadu mempunyai hak perlembagaan untuk diwakili oleh peguam semasa perekodan pernyataannya tidak boleh menjadi asas untuk membatalkan notis tersebut (lihat perenggan 27 & 30).

G

(4) Fakta bahawa responden-responden tidak campur tangan semasa perekodan pernyataan anak guam mereka bukan justifikasi untuk memutuskan bahawa perayu-perayu telah menyalahguna kuasa mereka dalam mengeluarkan notis tersebut. Ia tidak ditunjuk bahawa H responden-responden mempunyai apa-apa hak atau asas perlembagaan untuk hadir atau bahawa anak guam mereka mempunyai hak perlembagaan untuk diwakili oleh peguam semasa perekodan pernyataannya. Tidak terdapat peruntukan di dalam Akta yang memberikan peguam hak untuk hadir apabila pernyataan anak guam I mereka direkodkan dalam perjalanan pernyiasatan. Juga tidak terdapat unsur kejutan atau serangan kerana responden-responden diberitahu terlebih dahulu bahawa pernyataan mereka mungkin direkodkan jika mereka mendesak untuk hadir (lihat perenggan 31 & 34).]

Notes

For cases on ambit, see 1(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 320–323.

Cases referred to

Ahmad Azam bin Mohamad Salleh & Ors v Jabatan Pembangunan Koperasi Malaysia & Ors [2004] 4 MLJ 86, HC (refd)

Australian Broadcasting Tribunal v Bond and others [1990] 94 ALR 11, HC (refd)

Chng Suan Tze v The Minister of Home Affairs & Ors and other appeals [1989] 1 MLJ 69; [1988] 1 SLR 132, CA (refd)

City Growth Sdn Bhd & Anor v The Government of Malaysia [2006] 1 MLJ 581; [2005] 7 CLJ 422, HC (refd)

Datuk Seri Ahmad Said Hamdan, Ketua Suruhanjaya, Suruhanjaya Pencegah Rasuah Malaysia & Ors v Tan Boon Wah [2010] 3 MLJ 193, CA (refd)

Dr Michael Jeyakumar Devaraj v Peguam Negara Malaysia [2013] 2 MLJ 321, FC (refd)

Empayar Canggih Sdn Bhd v Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna Malaysia & Anor [2014] MLJU 1869, FC (refd)

Groban, In re (1957) 352 US 330, SC (refd)

Hashim bin Saud v Yahaya bin Hashim & Anor [1977] 2 MLJ 116, FC (refd)

Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors [2005] 6 MLJ 289, CA (refd)

Manjit Singh s/o Kirpal Singh and another v Attorney-General [2013] 2 SLR 844, CA (refd)

Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)

Regina v Director of Public Prosecutions, ex parte Kebilene and others [1999] 4 All ER 801; [2000] 2 AC 326, HL (refd)

R v Sloan [1990] 1 NZLR 474, HC (refd)

Reg v DPP exp Kebilene, Lord Steyn

Regina v Tower Hamlets London Borough Council, ex parte Chetnik Developments Ltd [1988] 1 All ER 961; [1988] AC 858, HL (refd)

Savrimuthu v PP [1987] 2 MLJ 173, SC (refd)

Tan Eng Chye v The Director of Prisons (No 2) [2004] 4 SLR 521, HC (refd)

Yeap Hock Seng @ Ah Seng v Minister For Home Affairs, Malaysia & Ors [1975] 2 MLJ 279 (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 4, 50(1)

Co-Operative Societies Act 1948 (repealed by Co-Operative Societies Act 1993)

A Criminal Procedure Code s 117
Customs Act 1967
Election Offences Act 1954
Federal Constitution art 5, 5(2), (3)
Gaming and Lotteries Act 1977 [NZ]
B Judicature Amendment Act 1972 [NZ]
Legal Profession Act (Cap 161) [SG] s 90(1)
Malaysian Anti-Corruption Commission Act 2009 ss 16(b), 30(1)(a), (3), (6), 69
Optical Discs Act 2000
C Penal Code
Rules of the High Court 1980 O 53, O 53 rr 2(4), 3

Appeal from: Civil Appeal No W-01–55–02 of 2013 (Court of Appeal, Putrajaya)

D

Suzana bt Atan (Senior Federal Counsel, Attorney General's Chambers) for the appellants.
Puravalen (Oh Choong Ghee and Shahid Adli bin Kamarudin with him) (Daim & Gamany) for the respondents.

E

Abu Samah Nordin FCJ (delivering judgment of the court):

[1] This is an appeal by the appellants against the decision of the Court of Appeal which dismissed their appeal and affirmed the decision of the Kuala F Lumpur High Court. The first appellant is an anti-corruption body specially established under the Malaysian Anti-Corruption Commission Act 2009 ('the Act') to promote integrity and accountability in the public and private sector. It is equipped with wide powers to investigate into and prosecute offences of corruption under the Act and certain offences, described as 'prescribed offence' G under the Penal Code, Customs Act 1967 and Election Offences Act 1954. The second appellant is the Government of Malaysia, which is a nominal party to this action. The third appellant is the investigation officer of the first appellant with the rank of an assistant superintendent.

H **[2]** The appellants are dissatisfied that their notice under s 30(1)(a) of the Act, directing the respondents to be present at the first appellant's office to be orally examined for purposes of assisting the first appellant in an investigation of a corruption offence under the Act was set aside by the High Court.

I FACTS IN BRIEF

[3] On 27 January 2012 one Shamsubahrin bin Ismail ('the complainant')

lodged a police report against Dato' Seri Salleh bin Ismail ('the suspect') who was the Chairman of National Feedlot Corp ('the company'). The complainant was an advisor to the company. The complainant alleged, among others, that the suspect had exerted undue pressure on him, through telephone and SMS to bribe the police as an inducement to close the investigation into allegations of improprieties in the company.

[4] Pursuant to the report, the first appellant summoned the complainant to its office to assist in the investigation and to have his statement recorded. On 19 March 2012 the complainant went to the first appellant's office to give his statement. He came with his lawyers, namely the respondents.

[5] The respondents insisted that they be allowed to be present during the recording of their client's statement, contending that their client had a constitutional right to be represented by counsel. The first appellant objected to their presence and indicated to them that there was no provision in the Act giving them any right to be present. Owing to the respondents uncompromising insistence and tense situation, the first appellant finally relented and allowed them to be present. But they were informed in advance that there may be a need to record their statements as well.

[6] After recording the complainant's statement, the respondents were informed orally that they were also required to give their statements in order to assist in the investigation. The respondents protested and refused to give their statements.

[7] Hence, on the same day, that is, 19 March 2012 the third appellant issued a notice under s 30(1)(a) of the Act to each respondent ordering both of them to be present at the first appellant's office on 23 March 2012 to be examined orally for the purposes of assisting the first appellant in the investigation of an offence of corruption under s 16(b) of the Act. Section 16(b) of the Act makes it an offence for any person, by himself or in conjunction with any other person, who corruptly gives, promises or offers to any person any gratification as an inducement or reward on account of:

(a) any person doing or forebearing to do anything in respect of any matter or transaction; or

(b) any officer of a public body doing or forebearing to do anything in respect of any matter or transaction.

[8] Under s 30(6) of the Act it is mandatory to comply with the said notice, notwithstanding any written law or rule of law to the contrary and anyone who

A contravenes the notice to be present and to be orally examined commits an offence, punishable with a fine not exceeding RM10,000 or to imprisonment not exceeding two years or to both (s 69 of the Act).

B **[9]** On 22 March 2012, three days after being served with the notice, the respondents informed the first appellant in writing that they would not be present at the first appellant's office, as directed.

C **[10]** On 30 April 2012 the respondents filed an application for leave to apply for judicial review under O 53 of the Rules of the High Court 1980 ('the RHC') for the following reliefs:

(a) for an order of certiorari to quash the notice issued under s 30(1)(a) of the Act;

D (b) for a declaration that the said notice is unlawful, ultra vires and/or an abuse of powers under the Act; and

(c) for a declaration that the first appellant had no power to record the statement of solicitors who represented their client during the recording of their client's statement. Leave was granted.

E

[11] After hearing the substantive motion, the High Court granted the application for judicial review and quashed the said notice on the ground that it was issued as an act of intimidation against the respondents acting as counsel for their client and an abuse of the appellants' powers under the Act and F therefore void and unlawful.

[12] The appellants appealed to the Court of Appeal against the decision of the High Court. The Court of Appeal dismissed the appellants' appeal. It agreed with the High Court that the issuance of the notice was clearly an act of G intimidation and an abuse of the first and third appellants' powers under the Act. It further held that the notice was not issued in good faith. The Court of Appeal held the view that the discretionary power to issue the notice under s 30(1)(a) of the Act is not an unfettered discretion but subject to a stringent requirement that it must, as the Federal Court in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 held, H be exercised for a proper purpose and not unreasonably, having regard to all relevant considerations and disregard all improper considerations.

I **[13]** On 6 April 2015 the appellants were granted leave to appeal to this court on the following question of law:

Whether a criminal investigative process such as a notice of investigation under s

30(1)(a) of the Malaysian Anti-Corruption Act 2009 is amenable to judicial review. A

[14] Section 30(1)(a) of the Act states:

30(1) An officer of the Commission investigating an offence order this Act may —

(a) order any person to attend before him for the purpose of being examined orally in relation to any matter which may, in his opinion, assist in the investigation into the offence. B

[15] Section 30(3) and (6) further state: C

30(3) A person to whom an order has been given under paragraph (1)(a) shall —

(a) attend in accordance with the terms of the order to be examined, and shall continue to attend from day to day where so directed until the examination is completed; and

(b) during such examination, disclose all information which is within his knowledge, or which is available to him, in respect of the matter in relation to which he is being examined, and answer any question put to him truthfully and to the best of his knowledge and belief, and shall not refuse to answer any question on the ground that it tends to incriminate him or his spouse. D E

(4) ...

(5) ...

(6) A person to whom an order or a notice is given under subsection (1) shall comply with such order or notice and with subsections (3), (4) and (5), notwithstanding any written law or rule of law to the contrary. F

SUBMISSIONS BEFORE THIS COURT

[16] The crux of the appellants' contention is that the issuance of the notice to the respondents is not amenable to judicial review as it was issued by the first appellant through the third appellant in exercise of her statutory power granted by s 30(1)(a) of the Act. Section 30(1)(a) of the Act confers a discretion on the officer of the first appellant to order any person, who in his or her opinion may be able to assist in the investigation of an offence under the Act, to be present and to be examined orally. The notice was issued in order to assist the first appellant in the investigation of a corruption offence under s 16(b) of the Act. The issuance of the notice was merely an administrative decision made in the course of an investigation. It is contended that an application for judicial review under O 53 r 2(4) of the RHC 1980 can only be made by a person who is adversely affected by the decision of any public authority. Hence, not all decisions and actions of a public officer is reviewable under O 53 r 2(4) of the G H I

RHC 1980. At the time the notice was issued there was no decision made by the first appellant on the outcome of the investigation as it was still in the midst of investigation of the alleged offence.

[17] It was held in *R v Sloan* [1990] 1 NZLR 474 that:

> Secondly, ... it is not every decision made under the statutory authority that is subject to review. A decision must go beyond what is merely administrative or procedural ... or the exercise of a function rather than a power ... Quite plainly, the conclusions reached by the inspectors here are of this kind and so are not reviewable. To hold otherwise, would as Mr Neave submitted, open up the investigative process of all enforcement agencies to constant judicial review; and that cannot have been the intention of Parliament.

It is contended that the decision to issue the notice was merely an administrative decision and therefore is not subject to judicial review.

[18] The appellants also relied on the following authorities in support of their contention that the notice is not amenable to judicial review: *Australian Broadcasting Tribunal v Bond and others* [1990] 94 ALR 11, *Tan Eng Chye v The Director of Prisons (No 2)* [2004] 4 SLR 521, *Empayar Canggih Sdn Bhd v Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna Malaysia & Anor* [2014] MLJU 1869 and *Datuk Seri Ahmad Said Hamdan, Ketua Suruhanjaya, Suruhanjaya Pencegah Rasuah Malaysia & Ors v Tan Boon Wah* [2010] 3 MLJ 193.

[19] Mr Puravalen, learned counsel for the respondents submitted that it was an act of intimidation and an abuse of powers to issue the notice to the respondents who merely acted as counsel during the recording of their client's statement. It was a violation of their client's fundamental right to counsel under art 5 of the Federal Constitution to deny their presence. Further, there was no nexus between the offence being investigated and the respondents, who only acted as counsel for their client. The respondents also alleged that the notice was issued mala fide and not in good faith.

[20] Learned counsel for the respondents reminded us of the Federal Court's observation in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd*, which the Court of Appeal in the instant case had rightly followed, that the discretion conferred by law is not an unfettered discretion and must not be exercised for an improper purpose or unreasonably. It would be an abuse of power to issue the notice, as in this case, under the guise of investigation, to the respondents who merely represented their client, whose right to counsel is entrenched in the Federal Constitution, during the recording

of their client's statement as a witness. The notice was clearly an act of intimidation to the respondents as the High Court had found that there was no evidence of interference by counsel during the recording of their client's statement.

[21] Learned counsel cited to us the decision of the Singapore Court of Appeal in *Manjit Singh s/o Kirpal Singh and another v Attorney-General* [2013] 2 SLR 844 where the court stated that delay occasioned by the review application per se was not a sufficient basis to exclude judicial review. In that case the applicant sought to quash the decision of the Chief Justice in the appointment of a member of Disciplinary Tribunal under s 90(1) of the Legal Profession Act (Cap 161) ('the LPA'). The court dismissed the originating summons on the ground that the power conferred by s 90(1) of the LPA was clearly administrative and it was not conferred on the Chief Justice in his judicial capacity. That is not a case in favour of the respondents.

[22] Learned counsel for the respondents also cited the following cases where it was submitted that questionable exercise of discretion or abuse of powers by the public authority had been challenged in courts: *Savrimuthu v Public Prosecutor* [1987] 2 MLJ 173, *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289, *Chng Suan Tze v The Minister of Home Affairs & Ors and other appeals* [1989] 1 MLJ 69; [1988] 1 SLR 132 and *Regina v Tower Hamlets London Borough Council, ex parte Chetnik Developments Ltd* [1988] 1 All ER 961; [1988] AC 858.

[23] It was further submitted that the decision of this court in *Empayar Canggih Sdn Bhd*'s case that the exercise of power in the course of investigation is not open to review is only a general principle of law which is subject to exceptions where there is dishonesty, bad faith or presence of some other exceptional circumstance as pointed out in *Regina v Director of Public Prosecutions, ex parte Kebilene and others* [1999] 4 All ER 801; [2000] 2 AC 326 or in appropriate cases, where the action of the executive is inconsistent with the Constitution and the law or in any manner arbitrary, irrational or mala fides or an abuse of power as was clarified by this court in *Dr Michael Jeyakumar Devaraj v Peguam Negara Malaysia* [2013] 2 MLJ 321.

DECISION

[24] The sole question of law for the court's determination is whether a criminal investigative process such as a notice of investigation under s 30(1)(a) of the Act is amenable to judicial review. The appellants contend that it is not amenable to judicial review. The respondents, on the other hand, contend that

it is amenable to judicial review and that the decision of this court in *Empayar Canggih Sdn Bhd*'s case that an exercise of power in the course of criminal investigation is not open to judicial review under O 53 of the RHC is however subject to the exceptions that it is not tainted by claims of dishonesty, bad faith or other exceptional circumstance as was held in *Regina v Director of Public Prosecutions, ex parte Kebilene and others* or where, to quote the decision of this court in *Dr Michael Jeyakumar Devaraj*'s case 'the policy or action of the executive is inconsistent with the Constitution and the law or in any manner arbitrary, irrational or there are elements of mala fides and abuse of power'. In short, the decision of the public authority in the course of criminal investigation or the decision of the executive is not totally unreviewable by way of judicial review.

[25] *Regina v Director of Public Prosecutions, ex parte Kebilene and others* was not considered in *Empayar Canggih Sdn Bhd*'s case and that both cases were also not considered in *Dr Michael Jeyakumar Devaraj*'s case. In that case the Federal Court spelt out the circumstances where policy or executive decisions may be open to judicial review. Whether or not the court should interfere however depend on the facts of each case. In *Regina v Director of Public Prosecutions, ex parte Kebilene and others*, Lord Steyn at p 371 said:

> My Lords, I would rule that absent dishonesty or mala fides or an exceptional circumstance, the decision of the Director to consent to the prosecution of the applicants is not amenable to judicial review.

[26] The foremost reason, if not the sole reason, that triggered the respondents' application for a declaration that the notice is unlawful and void is because they claim that it is an abuse of powers by the appellants and an act of intimidation against counsel who insisted to be present during the recording of their client's statement as a witness. It was the respondents' assertion that their client had a constitutional right under art 5 of the Federal Constitution to be represented by counsel, without however specifying which part of art 5 that applies to their client.

[27] Article 5(2) of the Constitution speaks of the right of a person who is being unlawfully detained to make a complaint to the High Court. This is a provision where a person claiming to be unlawfully detained, ordinarily applies for a writ of habeas corpus. Article 5(3) speaks of a right of an arrested person to consult and to be defended by a legal practitioner of his choice. The respondents' client is the complainant against a suspect in the commission of a corruption offence under s 16(b) of the Act. He is a witness and not a suspect or an arrested person or a person 'unlawfully detained'. So art 5(2) or 5(3) of the Constitution does not confer any constitutional right on the complainant to be represented by counsel during the recording of his statement as a witness. Learned counsel's contention that their client has a constitutional right under

art 5 to be represented by counsel is just a bare assertion. Not a single authority is cited to us to back up such contention.

[28] In *In re Groban* (1957) 352 US 330 the Ohio Supreme Court had to decide whether the witnesses (appellants) had a constitutional right under the Due Process Clause of the Fourteenth Amendment to the assistance of their own counsel in giving testimony as witnesses at a proceeding conducted by the Ohio State Fire Marshall to investigate the causes of fire. The Ohio Supreme Court held (by a majority of 5 against 4) that the appellants had no constitutional right to be assisted by counsel in giving testimony at the investigatory proceeding conducted by the Fire Marshall.

[29] Mr Justice Reed who the delivered the majority opinion of the court said:

> The proceeding before the Fire Marshal was not a criminal trial, nor was it an administrative proceeding that would in any way adjudicate appellants' responsibilities for the fire. It was a proceeding solely to elicit facts relating to the causes and circumstances of the fire. The Fire Marshal's duty was to 'determine whether the fire was the result of carelessness or design', and to arrest any person against whom there was sufficient evidence on which to base a charge of arson.
>
> The fact that appellants were under a legal duty to speak and that their testimony might provide a basis for criminal charges against them does not mean that they had a constitutional right to the assistance of their counsel. Appellants here are witnesses from whom information was sought as to the cause of the fire. A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel, nor can a witness before other investigatory bodies. There is no more reason to allow the presence of counsel before a Fire Marshal trying in the public interest to determine the cause of a fire. Obviously in these situations evidence obtained may possibly lay a witness open to criminal charges. When such charges are made in a criminal proceeding, he then may demand the presence of his counsel for his defence. Until then, his protection is the privilege against self-incrimination.

[30] An allegation that the notice was issued as an act of intimidation or was issued mala fide based on unmeritorious contention that the complainant had a constitutional right to be represented by counsel during the recording of his statement as a witness cannot be the basis for quashing the notice issued under s 30(1)(a) of the Act.

[31] The fact that the respondents did not interfere throughout the recording of their client's statement is no justification to hold that the appellants had abused their powers in issuing the notice. In the first place, it had not been shown that the respondents had any legal or constitutional basis to be present. Nor was it shown that their client had a constitutional right to be represented by counsel during the recording of their client's statement in the course of an investigation. There was no element of surprise or ambush. The

A respondents had been informed in advance that their statements may be recorded if they insisted on being present. They opted to be present, holding steadfastly to their contention that their client had a constitutional right to be represented.

B **[32]** The appellant categorically denied that the notice was issued mala fide or in bad faith. The burden is on the respondents to show that the notice was issued in bad faith. Mere suspicion is not sufficient. The case of *Yeap Hock Seng @ Ah Seng v Minister For Home Affairs, Malaysia & Ors* [1975] 2 MLJ 279 is an illustration that it would be an uphill task to prove an allegation of mala fide.
C In that case the applicant applied for a writ of habeas corpus, alleging that he was unlawfully detained and that his detention was made mala fide.

[33] Abdoolcader J in dismissing the application for habeas corpus at p 248 said:
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> The onus of proving mala fides on the part of the detaining authority is on the applicant and is normally extremely difficult to discharge as what is required is proof of improper or bad motive in order into invalidate the detention order for male fides and not mere suspicion ...
>
> E It might perhaps be open to the applicant to suggest that the circumstances surrounding his case might possibly relate to some suspicion of mala fides but this cannot be taken for granted or considered sufficient proof by itself.

[34] In the instant appeal, the allegation of mala fide against the appellants in
F issuing the notice was purely because of the respondents' sheer insistence that they be allowed to be present during the recording of their client's statement. What actually happened was the reverse. The respondents had in fact been allowed to be present although the appellants held the view that the respondents' client had no constitutional right to be represented at that stage.
G There is also no provision in the Act giving the solicitors the right to be present during the recording of their client's statement in the course of investigation.

[35] The Court of Appeal which relied on the decision of this court in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn*
H *Bhd*, in holding that the notice was void on the ground that the appellants had exercised their discretion wrongly or unreasonably and not in good faith had quoted the observation made by Raja Azlan Shah Ag CJ (as he then was) out of context. In that case, the registered owner of the land who held title in perpetuity surrendered its land for purposes of subdivision and realienation.
I The appellant, in communicating the decision of the Land Executive Committee stated that the approval for subdivision and realienation, was subject to the condition that the land would be realienated not in perpetuity but for a lease of 99 years, which the respondent seriously objected. The Federal Court held that the government had no power to make the registered

proprietor give up its freehold title and receive in exchange a 99 year lease. It was in that context that prompted Raja Azlan Shah Ag CJ, to make the following observation:

> Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and it should not be exercised unreasonably. In other words, every discretion cant be free from legal restraints. Where it is wrongly exercised, it becomes the duty of the courts to intervence. I would once again emphasise what has been said before, that 'public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place'.

[36] It is wholly inappropriate to equate the decision of the third appellant in exercising her discretion in issuing the notice under s 30(1)(a) of the Act with the decision of the government in *Sri Lempah Enterprise Sdn Bhd*'s case. In the instant appeal, the third appellant is expressly empowered by law to issue the notice whereas in *Sri Lempah Enterprise Sdn Bhd*'s case the Land Executive Committee had no power in law to order the registered landowner to give up its freehold title to the land and receive in exchange a leasehold title of 99 years.

[37] The weight of authorities tend to support the view that the actions or decisions of a public authority in exercise of its legitimate powers at the investigative stage are not amenable to judicial review. In *R v Sloan* [1990] 1 NZLR 474, Sloan was convicted under the Gaming and Lotteries Act 1977 for operating an illegal game of chance by using certain machines. After his conviction, he converted the use of those machines to a prize competition, which is outside the scope of the Act. But the Inspectors of Gaming still considered the new scheme an illegal game and issued letters to Sloan to cease operations forthwith, coupled with a threat of enforcement. Sloan then applied for a review under the Judicature Amendment Act 1972 and sought a declaration that the new scheme was lawful under the Gaming and Lotteries Act 1977 and that no enforcement actions should be taken against him. The High Court dismissed the application for review, holding that the decision of the inspectors was not subject to review.

[38] *R v Sloan* was favourably considered in *City Growth Sdn Bhd & Anor v The Government of Malaysia* [2006] 1 MLJ 581; [2005] 7 CLJ 422. In the latter case, the applicants (City Growth Sdn Bhd & Anor) applied for leave under O 53 r 3 of the RHC for an order of certiorari to quash the order issued by the deputy public prosecutor under s 50(1) of Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLA') directing the banks not to part with or deal in or otherwise dispose of the movable property, including any monetary instrument in the name of the applicants, based on information pursuant to investigation that the movable property is related to commission of an offence under s 4 of the AMLA. The

A High Court dismissed the leave application, holding that the order of the DPP was not amenable to judicial review. If all decisions and actions of public authority of this nature are amendable to review, the government machinery may not be able to function smoothly as the investigation process of all enforcement agencies would be open to constant judicial review. The High B Court in *City Growth Sdn Bhd*'s case had in turn followed its earlier decision in *Ahmad Azam bin Mohamad Salleh & Ors v Jabatan Pembangunan Koperasi Malaysia & Ors* [2004] 4 MLJ 86 where it held that the result of the inspection under the Co-Operative Societies Act 1948 was not amenable to judicial review.

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[39] The decision in *City Growth Sdn Bhd*'s case was cited and approved by this court in *Empayar Canggih Sdn Bhd*'s case. The appellant, Empayar Changgih Sdn Bhd, was in the business of manufacturing video compact discs, which was licensed under the Optical Discs Act 2000 (Act 606). A raid was D conducted at the new office of the appellant based on information that an offence under the Act could have been committed. During the raid, certain machines and equipment were seized and removed from the premises, causing some damage to the machines and equipment. The appellant filed an application for an order of certiorari against the respondents to quash the E decision of the second respondent who refused to release the seized machines and equipment, and for an order of mandamus to compel the second respondent to release and return the seized machines and equipment.

[40] Before the hearing of the judicial review application, the prayers were F amended, limiting the reliefs only for a declaration that the seizure of the machines and equipment was done without reasonable cause. The High Court dismissed the application holding that, on the facts, the raid and seizure was based on a reasonable cause in exercise of an investigative function. Its decision was affirmed by the Court of Appeal. The appellant was granted leave to appeal G to this court against the decision of the Court of Appeal. One of the questions of law posed was:

> Whether in a judicial review application which challenges the validity of the respondent's decision ... to seize any article, optical disc, thing, book or document under s 38(7) of Act 606, it is necessary for the respondents to justify the need for H such seizure as being reasonably necessary in the context of the purpose for which the raid was conducted.

[41] The appeal was dismissed by this court. It was held in that case that an I exercise of power in the course of a criminal investigation is not open to judicial review under O 53 of the RHC. To hold otherwise would be exposing the criminal investigative process of all law enforcement agencies in the country to

constant judicial review which surely could not have been the intention of Parliament. It was also held that the seizure was made in the course of a criminal investigation of an offence pursuant to the powers conferred by the Act. Such seizure was not amenable to judicial review. The appellant could have filed a writ action for damages.

[42] The general conclusion that can be drawn from the cases referred to above is that the actions or decisions of a public authority in exercise of its powers in the course of criminal investigation or enquiry is not open to judicial review. Therefore the answer to the question posed to this court is that the exercise of legitimate power, namely, the issuance of the notice pursuant to s 30(1)(a) of the Act by the first appellant through the third appellant is not amenable to judicial review. The notice was issued in order to assist the appellants in the investigation of a corruption offence under s 16(b) of the Act. To hold otherwise, would expose the criminal investigative processes of all law enforcement agencies to constant judicial review. On the facts of this case, the respondents failed to establish that the notice was issued mala fide or in bad faith.

[43] It seemed that the decision of the High Court in quashing the notice was based on the respondents' contention that their client has a constitutional right to be represented by counsel during the recording of their client's statement. The High Court relied on the decision of this court in *Hashim bin Saud v Yahaya bin Hashim & Anor* [1977] 2 MLJ 116. This is what Her Ladyship said in para (7) of her judgment:

> In this case, I am of the opinion that there is no doubt that the issuance of the said notice affect the rights of the applicants and also their obligation as lawyers representing their clients. As the learned counsel for the applicants had put it, it is direct interference with the exercise of their duty to their client.

[44] *Hashim bin Saud*'s case is not an authority that solicitors had a constitutional right to represent their client during the recording of the client's statement. The Federal Court's decision in *Hashim bin Saud*'s case was in respect of an arrested person's right of access to counsel. It was held in that case that the right to counsel of a person remanded under s 117 of the Criminal Procedure Code started from the day of his arrest but it could not be exercised immediately if it impedes police investigation or the administration of justice.

[45] For the aforesaid reasons, we allow the appeal by the appellants and set aside the orders of the courts below. We make no order as to costs.

A *Appeal allowed and decision of the courts below set aside.*

Reported by Ashok Kumar

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